

WALTER TORSKE & SONS,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 97-107-A
BILLINGS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	June 17, 1998

This is an appeal from a February 11, 1997, decision of the Billings Area Director, Bureau of Indian Affairs, affirming the approval of 10 leases on the Crow Reservation with Jack Cline as lessee. The Area Director's decision was issued following the Board's remand in Walter Torske & Sons v. Acting Billings Area Director (Torske I), 30 IBIA 157 (1997). For the reasons discussed below, the Board affirms the Area Director's decision.

In Torske I, Appellant sought review of a January 9, 1996, decision of the Area Director, which upheld a Superintendent's decision requiring Appellant and Cline to construct fencing between land leased or owned by Appellant and land covered by the 10 leases to Cline. On appeal to the Board, Appellant contended, *inter alia*, that Cline's leases were invalid because Cline failed to return his signed leases within the time required by the lease advertisement and because he also failed to submit his performance bonds in a timely manner.

The Board noted that, although Appellant had made this argument before the Area Director, the Area Director had not addressed it. For this and other reasons, the Board vacated the Area Director's decision and remanded the matter to him.

On remand, the Area Director concluded that the Superintendent's approval of Cline's leases was valid. He stated:

Mr. Cline complied with * * * requirements regarding bonding [and] payment of fees prior to the starting date of his lease terms which began on November 1, 1995. Although some time frames aren't exact, nevertheless, Mr. Cline signed the leases, paid the fees and returned bonding documents prior to the date the leases were to become effective.

Area Director's Decision at 1.

Appellant contends that, because Cline did not return his leases within 10 days, as required by the lease advertisement, Appellant was entitled, as the next highest bidder, to be awarded the leases. For this contention,

Appellant relies on a section of the lease advertisement titled "**AWARDING AND PREPARATION/RETURN OF LEASE FORMS**," which provides in part:

All lease contracts will be prepared and forwarded to the successful bidder by personnel of the Crow Indian Agency. The executed contract must be returned within ten (10) days from the date of mailing. **In the event the lease is not completed and returned within the specified time, the lease will be forfeited and may be offered to the next highest bidder at the rate of the highest bid.** TIME FRAMES WILL BE STRICTLY ENFORCED.

The Agency Realty Officer mailed the leases to Cline with letters dated June 15, 1995. Each letter stated: "Enclosed are the lease forms and stipulations for your completion. Please return ALL documents, signed and completed, within 10 (ten) working days from the date of this letter along with the filing fee and applicable rental and/or irrigation bonds."

According to a narrative statement apparently prepared at the Agency, "[t]hese documents, fees and bonds were all returned to Crow Agency on June 28, 1995, or within nine (9) days." The Area Director did not specifically find that the signed leases were returned to the Agency on June 28, 1995. He did find, however, that Cline paid his lease fees on that date. He further found that Cline signed the leases on June 20, 1995, and signed applications for bonds on June 26, 1995.

Among other things, Appellant disputes the Area Director's conclusion that Cline signed the leases on June 20, 1995. Appellant alleges that, on September 11, 1995, the Superintendent told Appellant's attorney that the leases had not been signed by Cline. Appellant presents no proof, however, that the Superintendent made such a statement. Nor does he show that the Superintendent had actual knowledge, on September 11, 1995, of the signature status of Cline's leases.

On each of the ten leases, "6-20-95" is shown as the date of Cline's signature. The Board finds that Appellant has failed to show that the signature dates shown on the leases are incorrect.

Because there are no date-stamps on the leases, it is not possible to ascertain the exact date they were returned to the Agency. However, in light of the fact that Cline paid his lease fees on June 28, 1998, it appears most likely that he returned the signed leases to the Agency on or before that date.

The Board finds that Appellant has failed to show that Cline did not return the signed leases to the Agency by June 28, 1995.

Appellant also contends that Cline was required to return the signed leases within 10 calendar days, rather than 10 working days as stated in the Realty Officer's letters to Cline. The lease advertisement did not specify whether the 10 days allowed for return of signed leases were calendar days or working days. Appellant points to no regulation that requires return of signed leases within 10 calendar days. The Realty Officer's letters to Cline appear to be based upon a form letter, and there is no suggestion that

Cline was given any more time for return of leases than other lessees. The Board finds that the Realty Officer had the authority to interpret the lease advertisement as allowing 10 working days for the return of signed leases. 1/ The Board further finds that Appellant has failed to show that Cline did not return the signed leases within 10 working days.

Appellant next contends that Cline was untimely in submitting his performance bonds. Further, it contends, in essence, that the Superintendent's approval of the leases was invalid because Cline's completed bonds had not been received at the Agency at the time the Superintendent approved the leases.

The Superintendent approved some of Cline's leases on September 14, some on September 15, and one on September 21, 1995. 2/ The Area Director found that Cline's completed bonds were not received at the Agency until October 18, 1995.

25 C.F.R. § 162.5(c) provides that, "[u]nless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease." This regulation does not establish a deadline for submission of bonds and does not state that a bond must be in place before a lease is approved.

In a section titled "**BONDING**," the lease advertisement states that "[t]he successful bidder will be required to furnish a performance bond" and that "**[s]ubmission of the bond(s) must be made prior to approval of the lease.**"

The Area Director criticized the Superintendent for approving Cline's leases prior to receipt of his bonds but stated that the approval was "a discretionary call by the Superintendent." Area Director's Decision at 2. As noted above, the Area Director ultimately concluded that the Superintendent's approval was valid in light of the fact that the bonds, as well as all other lease documents, were received prior to the starting date of the leases.

Undoubtedly there are good reasons for withholding approval of leases until bonds have been submitted. The Area Director noted, for instance, that, where a bond is not in place prior to approval of the lease, cancellation of the lease might be required if the lessee were to fail to obtain a bond. Nevertheless, it is conceivable that, in some circumstances, a Superintendent could reasonably approve a lease prior to submission of a bond.

1/ Nevertheless, for purposes of clarity, the Agency should consider revising its lease advertisement form to specify either 10 calendar days or 10 working days.

2/ The record shows that, during the period between June and September 1995, there were a number of meetings and other communications between the parties concerning the fencing problem discussed in Torske I.

BIA's approval of a lease involves the exercise of discretion. E.g., Blackhawk v. Billings Area Director, 24 IBIA 275 (1993). Therefore, in an appeal challenging a lease approval, the Board does not substitute its judgment for BIA's but affirms the approval unless there is a showing that the legal prerequisites to the exercise of discretion have not been met or that there has been an abuse of discretion. E.g., Blackmore v. Billings Area Director, 30 IBIA 235 (1997). In this case, the Board finds that Appellant has shown neither legal error nor abuse of discretion in the Superintendent's approval of Cline's leases. The Board further finds that Appellant has not shown error in the Area Director's February 11, 1997, decision. 3/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's February 11, 1997, decision is affirmed. 4/

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

3/ Although the Area Director's decision also touched on the fencing issue, Appellant does not challenge that part of the decision.

4/ Appellant's motion for expedited consideration is denied.